IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA.

CWP No. 224 of 2003

Date of Decision : 12.6.2007

G. P. Lippa through its President & Ors. …Petitioners.

Versus:

State of H.P. & Ors. …Respondents.

***Coram*:**

The Hon'ble Mr.Justice Sanjay Karol, Judge.

Whether approved for reporting?[1] Yes

For the petitioners: Mr. G.D.Verma, Sr. Advocate with Mr. B. C. Verma, Advocate.

For respondents 1 to 3 : Mr. J. K. Verma, Dy. Advocate General.

Sanjay Karol, J (Oral).

This judgment is being dictated in open Court in presence of the learned counsel for the parties.

Shri Ram Parkash (respondent No.4) moved an application dated 1.8.1995 (Annexure P-3) for grant of land for agriculture purpose under the Himachal Pradesh Nautor Land Rules, 1968 (hereinafter referred to as 'the Rules'). He declared himself to be a poor person having an income of Rs.10,000/- per annum, from all sources seeking grant of land on khasra No. 899/1 measuring 0-00-81 hects. (Approx. 90 Sq. mtrs.) in Up-Muhal Lippa khas in the estate of Chak Lippa. The said

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[1] **Whether reporters of Local Papers may be allowed to see the judgment?**

application supported by an affidavit was duly processed by the various agencies including the Forest Department and was placed before the Additional District Magistrate-cum-Sub Divisional Officer (Civil), Pooh, District Kinnaur, who passed an order dated 26th August, 1996 granting the land in question to respondent No.4 for horticulture purposes. Various residents of village Lippa, Tehsil Moorang through Shri Kaljang Nimma, Up-Pradhan preferred an appeal before the Deputy Commissioner, Kinnaur, being Appeal No. 31 of 1996 titled as Gramvasi Lippa vs. Ram Parkash & Ors. The same was allowed in terms of the order dated 31st March, 1997, wherein it was observed that;

i) the Forest Department was in possession of the land and had enclosed the land with barbed wire being the recorded owner of the same in the revenue record;

ii) Adjoining to the land in question, there is a passage which goes to the Harijan Basti and part of this land is also being used for the passage.

iii) The land in question being 0-00-64 Hects. is rocky, without any source of water and at the most one or two fruit growing trees can be planted there upon. He has also recorded the objections of the residents/ appellants, though not dealt with the same, that the land in question has been allotted inspite of serious objections of the residents apparently for commercial purposes. The objection that the land may be

required for widening of the road leading to the bridge is also noted.

Aggrieved by the said order, respondent No.4 herein preferred an appeal under Rule 28 before the Commissioner, Shimla Division, which was registered as Rev. Misc. Appeal No. 112 of 1997 titled as Ram Parkash vs. State of H.P. & Ors. The same was rejected and the order dated 31st March, 1997 passed by the Deputy Commissioner, was affirmed. Importantly, the State before the said authority also objected to the grant of land on the ground that the Deputy Commissioner had rightly noted the objections of the Gram Panchayat and the Forest Department. Thus, as of this date and before the said authority, the State Government was also aggrieved by the grant made in favour of respondent No.4 in terms of the order dated 26th August, 1996.

Aggrieved by the cancellation of the grant and affirmation thereof, respondent No.4 preferred a Revenue Appeal No. 28 of 1997 before the Financial Commissioner (Appeals), Himachal Pradesh, titled as Ram Parkash vs. State of H. P. & Ors. which was subsequently treated as revision under Rule 30. The Financial Commissioner allowed the revision in terms of order dated 5th December, 1998 on the ground that ;

a) none of the residents of the locality whose right to path / passage is affected as a result of this grant has come forward to object for the same;
b) the objection is frivolous and without any basis;
c) the objections are for cross purposes and with oblique motive;
d) there is enough space left to consider the possibility of widening of the road leading to the bridge;
e) other persons have also been granted similar Nautor land and, therefore, the residents could not be discriminated;

Review against the said order was also filed by the petitioners herein interalia on the following grounds:-

i) The grant was made without impleading the objectors / petitioners as necessary parties as they had interest in the land being Estate Right Holders;

ii) Even though the purpose specified in the application for grant was agriculture. However, the same could not have been granted for horticulture purposes.

iii) Without the consent of the Central Govt. as envisaged under the provisions of the Forest (Conservation) Act, 1980, the land could not have been allotted for the reason that the same is demarcated protected forest and recorded as forest land in the revenue record;

iv) The land in any event cannot be put use for the purposes for which the grant has been made for the reasons that the same is too small and the topography is such that it is not suitable;

v) In addition to his owning more than 20 bighas of land in the adjoining areas, the allottee in any case has got income of more than Rs.2,000/- per annum and making him ineligible for any grant under the Rules;

vi) Part of the land is being used as path leading to the Harjan Basti in the area;

vii) No report has been obtained from the Public Works Department with regard to their requirement in the near future;

viii) Respondent No.4 being rich businessman and important person wants own to utilize the land for the purposes of construction of shop as the land is situated in a highly congested area.

The said revenue review No. 1 of 2000 titled as Kalijang Nimma & Ors. vs. Ram Parkash & Ors., was dismissed. Hence, the present writ petition.

The record of the case was summoned and perused.

Shri G. D. Verma, Learned Senior Counsel for the petitioners while reiterating the stand taken in writ petition and also the grounds of review has emphasized that in terms of the report submitted by the DFO, Annexure P-A, the land in question being undemarcated forest could not have been allotted without obtaining prior permission from the Govt. of India in accordance with the provisions of the Forest (Conservation) Act, 1980. On a query put to the learned Deputy Advocate General, this Court is informed that no such permission has ever been sought for or obtained. That such permission was required is also not in dispute.

Learned Deputy Advocate General has clarified that even though respondent No.4 had applied for grant of land for agriculture purposes, however, during the course of enquiry, prior to the order of grant, the statement of respondent No.4 was recorded that the grant be made for horticulture purposes. This position is borne out from the record. Therefore, this squarely meets the contention of the learned counsel for the petitioners that no grant could have ever been made for horticulture purposes.

The grant of Nautor Land in the State of Himachal Pradesh is made under the Rules, the purposes for which the grant can be made are specified in Rule 5. Upto 20 bighas of land can be granted for the

specified purposes. Relevant eligibility criteria for the sake of convenience is reproduced as under: -

> "**7. *Eligibility for nautor land***:- Save for the widow and the children of a member of an armed force or semi-armed force , who has laid down his life for the country (whose widow and children were eligible for grant anywhere within the Tehsil subject to the conditions mentioned in the wajib-ul-Arjin in respect of the areas where the land applied for is situated) no one who is not the resident in the estate in which the land applied for is situated, shall be eligible for the grant. Every resident of the estate in which the land applied for lies will be eligible in the following orders of preference:-
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> (a) Such persons who have less than ten bighas of land under self cultivation on 1.1.1974, whether as owners or as tenants, or as lessees, either individually or collectively, or have an income of less than Rs. 2,000/- per annum from all sources including lands. Provided that in this category a department of one who has laid down his life for the defence of the country will get preference over his counterparts _ _ _ _ _ _ _ _ _ _ _ _ _ _ _ _ _."

Application for grant of land is made under Rule 13 and the procedure for process of the application is provided for in Rule 14. In terms of Rule 14 (c), comments of the Kanungo Gram Panchayat of the area and the Forest Range Officer are invited. The Forest Range Officer is required to make its report with regard to the trees and the land which are required to be considered by the Sub Divisional Officer before passing the order of grant. An appeal against the order of Sub Divisional Officer (Civil) is to be made to the Deputy Commissioner in accordance with the

provisions of Rule 28. Rule 30 provides for the revisional powers of the Financial Commissioner.

With regard to the grant having been made in violation of the Forest (Conservation) Act, 1980 (hereinafter referred to as 'the Conservation Act'), it is important to note that the said Act stipulates that without prior approval of the Central Govt., the State Govt. cannot direct that any forest land or portion thereof be used for any non-forest purposes or any forest land or portion thereof be assigned by way of lease or otherwise to any private person. The fact that this land is covered under the provisions of the Conservation Act is undisputed. Interestingly, the Additional District Magistrate while making the grant took note of the objections of the Forest Department but however overruled the same by holding that the land in question is classified as *Charagah Drakhtan / Bila Drakhtan* in the revenue records and thus is not a forest land. Importantly, in ***T. N. Godavarman Thirumulkpad etc***. v. ***Union of India and others*** (AIR 1997 SC 1228), the Apex Court has held that the term *'forest land'* occurring in Section 2 will not only include *'forest'* as understood in the dictionary sense, but also any area recorded as forest in the Government record irrespective of the ownership. This Court in CWP No. 447 of 2000 titled as Jalam Singh vs. Union of India & Ors. and CWP No. 562 of 2000 titled as M/s. Ahuja Plastics Ltd. vs. Union of India & Ors. has further held as under:

> "The meaning and content given to the expression "forest land" in *Ambika Quarry, Samatha, Supreme Court Monitoring Committee and Godavarman*, for the purpose of Section 2 of the FC Act covers also such Government lands which in the opinion of the Government can be reclaimed and brought under vegetative

cover as also the wild uncultivated waste lands in the dictionary sense which the area in question admittedly is. We are also of the view, as noticed in the earlier part of the judgment, that any area of the Government land which the State considers to be "forest land" would also be "forest land" for the purposes of the FC Act.

This apart, the fact remains that the area in question is Government land and is in the possession of Department of Forests. All areas in possession of the Forest Department in our opinion cannot but be for forest use and purposes. We are not unmindful of the fact that the Government land which is not meant for forest purposes or forest use is not shown in possession of the Forest Department in the revenue record.

In our considered view, any Government land which Government considers to be "forest land" irrespective of its classification in the revenue record will the "forest land" for the purposes of FC Act. It is not open to any third person to contend and say that such land is not "forest land". Any other interpretation, taking into consideration the objects and reasons for which FC Act was enacted, which does not subserve the purpose and object of the Act, is not permissible."

The Deputy Commissioner while passing the order as has already been noticed hereinabove, has recorded that the land in question is still in the possession of the Forest Department and has been recorded as such in the revenue record. I have already noticed above that even the State through its District Attorneys had opposed the grant on the ground that inspite of the objections of the Forest Department, the grant was made by the Sub Divisional Officer (Civil). This aspect, inspite of the objections having been brought to the notice of the Financial Commissioner, has been totally ignored and over looked by him. In view of the admitted position, I am of the considered view that the land could

not have been allotted to respondent No.4 in view of the specific objection of the Forest Department as there was no permission as is required under the provisions of the Conservation Act and the Rules framed thereunder.

The State was to judiciously exercise its powers taking all relevant considerations rather than indulge into benevolent or philanthropic grounds. The grant has to be given on relevant material considerations. Apparently, the authority misled itself by eccentric principle of philanthropy.

In any event respondent No.4 was ineligible for grant of land as he was admittedly having an income of more than Rs.2000/- per annum from all sources. Application for grant discloses that respondent No.4 is having an income of Rs.10,000/- per annum from all sources. Though, it is difficult to believe that a person owning an orchard of 10 bighas of land would be having an income of only Rs.10,000/- per annum. While considering the similar issue, the Apex Court in ***Gopinder Singh*** vs. ***The Forest Department of Himachal Pradesh and others*** reported in AIR 1991 SC 433, and this Court in ***Mast Ram*** vs. ***State of H.P. & Ors***. (1998(2) Shimla Law Cases 305), has held that the person having an income of more than Rs.2,000/- per annum from all sources would be ineligible for any grant under the Rules.

Every holder of a public office is a trustee whose highest duty is to the people of the country and, therefore, every act of the holder of a public office, irrespective of the label classifying that act, is in discharge of public duty meant ultimately for public good. Conferment of the power together with the discretion which goes with it to enable proper

exercise of the power is coupled with the duty to shun arbitrariness in its exercise and to promote the object for which the power is conferred, which undoubtedly is public interest and not individual or private gain, whim or caprice of any individual. All persons entrusted with any such power have to bear in mind its necessary concomitant which alone justifies conferment of power under the rule of law.

Every State action, in order to survive, must not be susceptible to the vice of arbitrariness which is the crux of Article 14 and basic to the rule of law. Arbitrariness is the very negation of the rule of law. Satisfaction of this basic test in every State action is sine qua non to its validity.

Non-arbitrariness, being a necessary concomitant of the rule of law, it is imperative that all actions of every public functionary in whatever sphere must be guided by reason and not humour, whim, caprice or personal predilections of the persons entrusted with the task on behalf of the State and exercise of all powers must be for public good instead of being an abuse of power.

Public authority can be held to have acted wrongly if they have failed to take account of relevant considerations which would obviously render the action *ultra vires* and void.

There is a distinction between exercise of power in good faith and misuse in bad faith. The former arises when an authority misuses its power in breach of law, say, by taking into account bona fide, and with

best of intentions, some extraneous matters or by ignoring relevant matters. That would render the impugned act or order *ultra vires* It would be a case of fraud on power. ***Express Newspapers Pvt Ltd. and others*** vs. ***Union of India and others*** (1986(I) SCC 133).

I have seen the photographs placed on record from which it is abundantly clear that the land in question being very small i.e. 90 sq. yard, apart from being rocky, is highly unsuitable for either agriculture or horticulture purposes. It is within the vicinity of the market place and obviously the same seems to have been allotted for purposes other than sought for. The site plan shows that there is a path leading to the *Basti* of *Harijans* living in the area. As to whether the same could be used as such is a different question. If the people have been using the same for a considerable period of time, the respondent authority take a lenient view but that does not mean that respondent No.4 by virtue of this fact alone is entitled for grant of the land under the Rules. Certainly, the residents of the village including the Gram Panchayat before this Court has a right to object to the grant. The Government being custodian of public land has to ensure that the same is used for public purposes and more particularly for the upliftment of the socially and economically weaker section of the society, for which purpose, the scheme and the rules have been framed.

The manner in which the grant has been made to respondent No.4 and also the manner in which the revision petition has been entertained and decided by the Revisional Authority is shocking. The grant being contrary to Rules is illegal. Certainly, the grant in the present case is as a result of the colourable exercise of power which stands

vitiated. Revisional authority was to have atleast afforded an opportunity of hearing to the interested persons.

I am in agreement with the learned counsel for the petitioners that the authorities below ought to have afforded an opportunity of hearing to interested persons, particularly when they have been objecting. Even if for cross purposes and oblique motives, similar grants were made to respondent No.4 that in itself was no ground to have illegally made the grant.

Learned Senior Counsel appearing for the petitioners has also argued that the Revsional Authority has exceeded its jurisdiction in interfering with the orders passed by the Deputy Commissioner as well as the Sub Divisional Officer, which were findings of facts. I am in total agreement with the said submissions of the learned counsel. Undue interference of the Financial Commissioner has infact resulted into miscarriage of justice. The ADM-cum-Sub Divisional Officer (Civil) equally erred in holding, without any basis or assigning any reason that the objections of the Forest Department are unfounded.

For all the aforesaid reasons, I allow the present writ petition and set aside the impugned orders dated 5th December, 1998, 23rd July, 2002 as also the order of grant dated 26th August, 1996.

(Sanjay Karol),
Judge.

June 12, 2007.
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